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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON and GEORGE T. SMITH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF *AMICUS CURIAE* SUBMITTED BY EMERGENCY CIVIL LIBERTIES COMMITTEE

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No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON and GEORGE T. SMITH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF *AMICUS CURIAE* SUBMITTED BY EMERGENCY CIVIL LIBERTIES COMMITTEE

Statement

The *amicus curiae,* Emergency Civil Liberties Committee, is an unincorporated association organized for the purpose of protecting the civil liberties and civil rights of the people of the United States, with particular reference to the rights guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Committee files, from time to time, *amicus curiae* briefs in cases pending in this and other courts in which civil liberties and civil rights issues appear to be of substantial constitutional importance. In the present case there is an inter-

twining of civil liberties and civil rights issues which *amicus* believes to be of particular importance.

This brief, which is filed with the consent of the parties, is directed to (1) the constitutionally protected franchise rights and First Amendment rights of the citizens of the 136th House Election District and (2) the free speech rights of appellant Bond.

ARGUMENT

POINT I

Exclusion of appellant Bond from his elected position violated the constitutionally protected rights and freedoms of the citizens of the 136th House Election District.

A. Appellants King and Keyes have Judicial Standing to Bring Before this Court the Violations of the Constitutional Rights of the Constituents of the Election District.

The decision of the court below that appellants King and Keyes did not have standing to bring the complaint is contrary to the decisions of this Court which are examined and discussed at length in *Baker* v. *Carr,* 369 U. S. 186, 206-208 (1962). The appellants King and Keyes and all those similarly situated have significant interests which have been injured by the proceedings below. Their rights to a meaningful exercise of both the franchise and the First Amendment freedoms without impairment by State action are judicially recognized as rights secured by the Constitution for which an individual may claim the protection of the laws. See *Baker* v. *Carr, supra; Gray* v. *Sanders,* 372 U. S. 368, 375 (1963).

The finding of the court below cannot be placed upon an alleged temporary lack of representation since the record is undisputed that the constituents of the 136th House Dis-

trict have now twice been denied representation by the person elected by an overwhelming vote of the District. This is not a case where there is a pending inquiry to determine what action should be taken. Rather, the State has acted and has thereby denied the constituency of their franchise rights and their political freedoms under the First Amendment.

Nor can the Court rely upon the assumption that the complaint of Mr. Bond alone will resolve every conceivable issue in this case. As discussed below, the exclusion of Mr. Bond has resulted in a particular, legally cognizable injury to the residents of the 136th House District by destroying the effectiveness of their vote and of their political freedoms under the First Amendment. These rights, it is submitted, are most properly brought before this Court by the appellants King and Keyes and those similarly situated who are the direct victims of the injury.

B. The Exclusion Violated the Constitutionally Protected Franchise Rights of the Citizens of the Election District.

The present case touches principles at the foundation of our liberties—principles which were evolved during the early years of the founding period, and which remain to this day a constant concern of this Court.

The right of the people to be represented in the governing bodies by persons freely chosen by the people was cultivated early in the American soil. The First Continental Congress declared in 1774:

> "That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council . . ." *

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* *Declaration and Resolves of the First Continental Congress,* October 14, 1774, Resolved 4, Charles C. Tansill (ed.), "Documents Illustrative of the Formation of the Union of the American States," 69th Cong., 1st Sess., 1927, House Doc. 398, 1-5.

More than one hundred years earlier, colonial lawmakers had declared:

> "It is the libertie of the freemen to choose such deputies for the Generall Court out of themselves, either in their owne Townes or elsewhere as they judge fitest." *

Two years after the First Continental Congress, the newly declared independent colonies reaffirmed the fundamental nature of the right of the people to participate in the government through the free election of representatives of their choice. Section 6 of the Delaware Declaration of Rights (September 11, 1776),** for example, declared:

> "That the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent. . . ."

Similarly, Article V of the Constitution of Maryland (November 3, 1766)*** provided:

> "That the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent. . . ."

Recent years have witnessed the full growth of these historical roots. Two years ago, Chief Justice Warren wrote for the Court that "history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of

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* William H. Whitmore (ed.), *The Colonial Laws of Massachusetts, 1672* (Boston, 1890), 33-61.

** Laws of the State of Delaware, 1700-1797 (New Castle, 1797), I, Appendix, 79-81.

*** Francis N. Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (Washington, 1909), III, 1686-91.

one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964).*

The equal protection of the laws guaranteed by the Fourteenth Amendment prohibits a State from denying equality to the people of the State in participating in the legislature. The prohibition applies whether the State has directly excluded a group from the franchise or has structured the legislative bodies in such a manner as to make the people's participation therein, through the choice of representatives therefor, unequal and disproportionate.**

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* Also see *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C.C.A. 4th Cir. 1947), *cert. den.* 333 U. S. 875 (1948), where Parker C. J., writing for a unanimous Court, declared:

> "An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The disfranchised can never speak with the same force as those who are able to vote. The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time."

** See: *Reynolds* v. *Sims*, *supra*, at pp. 554-555:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally pro-

The exclusion of appellant Julian Bond from his elected office in the Georgia House of Representatives is no less a denial of the equal protection of the laws.

The principle of "one man, one vote", found by this Court to be mandated by the Fourteenth Amendment guarantee of equal protection, is rendered a nullity if it be permissible for the legislature to exclude a representative elected by the majority of the votes cast. For the constituents of that representative, the principle of "one man, one vote" has been replaced by "majority of the people, no vote", and the right to equal participation in the Legislature has been denied them. This Court's findings that "representative government is in essence self-government through the medium of elected representatives of the people", that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies" and that "most citizens can achieve this participation only as qualified voters through the election of legislators to represent them" *, prohibits both denial of the vote and denial of office to the person elected. Either denial destroys representative government and deprives the residents of the effected

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tected right to vote, *Ex parte Yarbrough,* 110 U. S. 651, and to have their votes counted, *United States* v. *Mosley,* 238 U. S. 383. . . . The right to vote can neither be denied outright, *Guinn* v. *United States,* 238 U. S. 347, *Lane* v. *Wilson,* 307 U. S. 268, nor destroyed by alteration of ballots, see *United States* v. *Classic,* 313 U. S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold,* 100 U. S. 371, *United States* v. *Saylor,* 322 U. S. 385. As the court stated in *Classic,* 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . .' 313 U. S., at 315. . . . And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

* *Reynolds* v. *Sims, supra,* at p. 565 of 377 U. S.

district of an equal, full and effective participation in the governmental political processes.

The actual facts of the present case dramatically illustrate the principle that the constitutional right to equal participation in the legislature necessarily encompasses the right to be represented by the person freely chosen by the voters. Recognition of the right to equality in the franchise led to the very creation of the 136th House District following the reapportionment decision in *Toombs* v. *Forston*, 241 F. Supp. 65 (N.D. Ga., 1965). Exercising their right of equal franchise, the constituents of the 136th House District chose Mr. Bond to represent them. Having excluded Mr. Bond, the Georgia House of Rrepresentatives has not only denied equality of the franchise to the people of the 136th House District, it has, in effect, denied the franchise completely.

In assessing the constitutional status of the exclusion of appellant Bond from the Legislature, the fact that the 136th House District is composed overwhelmingly of Negro constituents is entirely relevant. Sixteen years ago it was noted in this Court that the malapportionment then existing under the Georgia County Unit System resulted in the substantial disenfranchisement of the urban Negro population of Georgia. *South* v. *Peters*, 339 U. S. 276, 277 (1950) (dissenting opinion). The struggle of the Negro population of Georgia for equality and for full participation in the governmental processes has been long and tenacious.* See *e.g. United States* v. *Guest*, U.S.S.C. 34 L.W. 4323 (March 28, 1966) (conspiracy to interfere with Negro citizens' exercise of rights and privileges secured by the Constitution; *Calhoun* v. *Latimer*, 377 U. S. 263 (1964) (school de-

* The militant civil rights struggle of the Negro population of the South and the ensuing intense resentment and opposition of the politically dominant white communities is a matter of which this Court may properly take notice. *NAACP* v. *Button*, 371 U. S. 415, 435 (1963).

segregation); *Wright* v. *Georgia*, 373 U. S. 284 (1963) (city playground facilities); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955) (city golf course); *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55 (5th Cir. 1964), *cert. den. sub. nom. Roberts* v. *Stell*, 379 U. S. 933 (1964) (school desegregation); *Kelly* v. *Page*, 335 F. 2d 114 (5th Cir. 1964) (picketing and marching to eliminate racial discrimination); *United States* v. *Bibb County Democratic Executive Comm.*, 222 F. Supp. 493 M.D. Ga. 1962) (racial distinctions in use of voting facilities and polling places and in tabulating votes); *Anderson* v. *Courson*, 203 F. Supp. 806 (M.D. Ga. 1962) (maintenance of racially segregated voting lists); *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga. 1960) (separate registration application forms and separate registration and voting records).

The reapportionment of the House Districts with the creation of the 136th House District gave to a population, previously disenfranchised and denied equality in the participation in government and in the benefits of government, the essence of the political freedoms declared by the Founding Fathers, implied at the foundations of our representative governmental structure and guaranteed by the First and Fourteenth Amendments. In determining the impact of defendants' actions in excluding the person twice elected to the Legislature from the 136th House District upon the First and Fourteenth Amendment rights of the residents of that District, it is significant that the voters who have thereby been deprived of any meaning to their vote are predominantly of that segment of the population previously denied the franchise and equal protection. Both history and the substance of the Amendment require recognition of these facts, for the achievement of basic civil and political rights to the Negro population was the "primary concern" of the framers of the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); see also: *Rice* v. *Elmore, supra.*

The claim of the House's jurisdiction over the qualifications of its members cannot validate the exclusion of Mr. Bond. No matter how sophisticated the mode or rationale, the Constitution is concerned with and prohibits the essential disenfranchisement and denial of equality which has been the result herein. Cf. *Gomilion* v. *Lightfoot*, 364 U. S. 339, 342 (1960).

C. The Exclusion Violated the First Amendment Rights of the Citizens of the Election District.

The rights embodied in the First Amendment are essential to the exercise of political freedom. These rights are not Pyrrhic exercises but represent the constitutional conclusion that to keep the nation free, the State may not abridge these political rights. Nearly forty years ago, Mr. Justice Brandeis noted the intention of the Founding Fathers to guarantee free speech as a means of assuring political independence and liberties.

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable

> government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of government majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Whitney* v. *California,* 274 U. S. 357, 375-376, (1927).

It is through the intertwining of the First Amendment with the political ends of democracy that this Court, commencing with the opinions of Mr. Justices Holmes and Mr. Justice Brandeis, has evolved the only sustaining restriction upon First Amendment rights—the clear and present danger doctrine.* Free speech remains forever constitutionally protected and inviolate when it seeks political change not inconsistent with the Constitution of the United States.

In *Stromberg* v. *California,* 283 U. S. 359, 369 (1931), Chief Justice Hughes, for the Court, declared:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Where the ends are within the ambit of constitutional change, or where the activities involved were for protected

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* While *amicus* does not view the doctrine of the clear and present danger as a permissible or wholesome restriction of the liberties protected against abridgement by the express language of the First Amendment, in the instant case, as demonstrated herein, the exclusion of Appellant Bond destroys the basis upon which rests even the more limited view of the First Amendment implied in the clear and present danger doctrine.

ends, this Court has without failure held unconstitutional and void any attempt to restrict such activities. Thus, the Court has carefully and precisely noted that First Amendment freedoms conducted within the electoral process cannot be restricted by invocation of the clear and present danger doctrine or in any other manner. In *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 592 (1952) this Court stated:

> "Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence."

The most constitutional of ends in the exercise of First Amendment rights is the electoral process of popular election of representatives to the legislative body. To emasculate this right, as the State of Georgia has done by refusing to seat Appellant Bond, who has been twice duly elected by his constituents, is not only to deny the franchise right to the citizens of the 136th House District, but also to effectively deny them the politcal rights of the First Amendment.

This Court's description of the "right to exercise the franchise in a free and unimpaired manner" as "preservative of all rights", (*Reynolds* v. *Sims, supra,* at p. 562 of 377 U. S.; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886)), is another expression of the fact that impairment of the electoral processes transforms the great political freedoms of the First Amendment into a meaningless exercise. As stated in *Wesberry* v. *Sanders,* 376 U. S. 1, 17-18 (1964), the Georgia reapportionment case:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

must live. *Other rights, even the most basic, are illusory if the right to vote is undermined.*" (Emphasis supplied.)

By refusing to effectuate the constitutional end of the citizens of the 136th House District by banishing appellant Bond from the Georgia Legislature, the State has as effectively abridged and impaired the First Amendment rights of the citizens of the 136th District as if it had banned the newspapers, forbidden the speeches and outlawed the assemblies in favor of the election of appellant Bond. The conclusion necessarily follows that in excluding appellant Bond from his elected legislative office, the respondents, acting under State authority, have unconstitutionally violated and abridged the First Amendment rights of the citizens of appellant's legislative district.*

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* The interaction of representative government and the First Amendment freedoms has been considered by non-judicial authorities. The late Professor Alexander Meiklejohn wrote:

> ". . . the reason for . . . equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government.* It is not a Law of Nature or of Reason in the abstract. *It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.*" (Emphasis supplied.) Meiklejohn, Alexander, *Free Speech and Its Relation to Self-Government* (Harper & Bros. 1948), 25-7.

POINT II

The exclusion of appellant Bond from his elected office violated his rights of free speech guaranteed by the First and Fourteenth Amendments.

While the majority of the court below agreed that the separation of powers principle must, on the state level, give way to First Amendment rights, the court, nevertheless, proceeded to find that there was "room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution." To test the balance, the Court sought to determine whether appellant Bond had been denied due process of law.

This analysis is contrary to the view that the rights of free speech are accorded a constitutionally preferred position over other rights. *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 433 (1963). As stated in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963):

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 U. S. 516, 530."

The application of a "rational evidentiary basis" to test whether a candidate's utterances on national (or local) issues disqualifies him to take the oath of office can only result in candidates cautiously "steer[ing] far wider of

the unlawful zone," *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958) in their speeches and assemblies. The stultification of free debate and the tendency of the view in power to become the only expression on significant national and local issues are the by-products of the action of the Georgia House of Representatives upheld by the decision below. However, the First Amendment requires the opposite results; encouragement of debate and diversification of opinions are mandated by the Amendment. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964) the Court declared:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U. S. 476, 484. . . . 'It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v. California, 314 U. S. 252, 270 . . . and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion'. N.A.A.C.P. v. Button, 371 U. S. 415, 429."

The exclusion of appellant Bond cannot be justified by the assertion that the determination of the qualifications of state legislators by their peers is too sensitive an area for federal intervention. No matter how appealing in other circumstances, the protective coating of local state interests cannot block federal intervention where First Amendment rights are at stake. *Cf. Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965) (enjoining state criminal prosecutions). In the present case, the free speech rights of Mr. Bond are directly at stake in his exclusion from the Georgia House of Representatives.

Further, the restrictions on Mr. Bond's right to speak cannot be justified by the assertion that he sought to become a member of the House. It would seem self-obvious that, above all others, those who represent the people must have freedom to express their opinions. A knowledgeable electorate voting for persons whose views are known and on issues widely debated is a necessity of our democracy. *Cf. New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U. S. 64 (1964). Appellant Bond's free speech is, therefore, subject to even greater protection from restriction precisely because he was the elected representative from his district. He cannot be barred from office for exercising his constitutionally protected right of free speech. "The fact that . . . a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso* v. *Watkins,* 367 U. S. 488, 495-496 (1961).

CONCLUSION

The judgment of the United States District Court for the Northern District of Georgia should be reversed and the relief requested by Appellants granted.

Respectfully submitted,

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